

BEFORE THE
Federal Communications Commission
WASHINGTON, D.C. 20554

In the Matter of)	
)	
Modifying the Commission's Process to Avert)	
Harm to U.S. Competition and U.S. Customers)	IB Docket No. 05-254
Caused by Anticompetitive Conduct)	
)	

COMMENTS OF SPRINT NEXTEL CORPORATION

Sprint Nextel Corporation ("Sprint") hereby submits its comments pursuant to the Notice of Inquiry released by the Commission in the above-captioned proceeding ("*Notice*").¹

I. THERE IS SUBSTANTIAL NEED FOR REMEDIES TO ADDRESS THE ELEVATED THREAT OF ANTICOMPETITIVE "WHIPSAWING" BY FOREIGN CARRIERS.

Sprint shares the Commission's concerns regarding the use of circuit disruptions or the threat of circuit disruptions to force an increase in international settlement rates. Because of the highly competitive nature of the U.S.-international services market, U.S. carriers are acutely vulnerable to such coercion, whether it is applied by a single dominant foreign correspondent, through coordination with a foreign government, or as a result of anti-competitive collusion by multiple foreign carriers. Market conditions have evolved to a state where "whipsawing," *i.e.*, coercive, anticompetitive tactics by foreign carriers that capitalize on the high level of competition among U.S. carriers, can be effective. The great expansion of transmission capacity, significant improvements in compression, switching, and routing technologies, and the commoditization of international voice services due to depressed margins have led to a volatile

¹ Modifying the Commission's Process to Avert Harm to U.S. Competitions and U.S. Customers Caused by Anticompetitive Conduct, *Notice of Inquiry*, IB Docket No. 05-254, FCC 05-152 (released Aug. 15, 2005) ("*Notice*").

marketplace – one where consumers have benefited from declining prices, but one that remains susceptible to distortion if competitors can seek an advantage when termination rate increases are demanded by foreign correspondents, and those demands are backed up by threats of circuit disruption.

Most U.S.-originated traffic is “wholesale,” that is, it is originated with retail service providers (*e.g.*, mobile services providers, local exchange carriers, pre-paid card operators) who pass the traffic to international carriers for call completion. Sprint estimates that 80 to 90 percent of the international voice traffic it carries is wholesale. Routing arrangements for wholesale international minutes can be changed in a matter of days, sometimes hours. Wholesale international traffic is like water – usually the traffic will move in the direction of the lowest rate, but if other carriers’ circuits are blocked, significant amounts of traffic will “drain” toward the one carrier’s circuits that remain open, even at rates that are higher than previous ones. A recent change in the marketplace is that, even if the largest U.S. international carriers (AT&T, MCI, Sprint), adhere to notions of “fair play” when faced with coercive, anticompetitive conduct by foreign correspondents, other players in the U.S.-international services marketplace stand ready to seize the opportunities that arise when the largest carriers’ circuits are blocked. Regardless of whether an advantage gained from blocked circuits can be considered to be gained fairly, the result is successful whipsawing by the foreign correspondent, and higher prices for U.S. consumers.

For these reasons, Sprint accepts the necessity for a level of regulatory intervention where settlement rate increases are demanded under threat of circuit disruption. While the type of injunctive regulatory relief Sprint describes below is extraordinary, the spate of coercive episodes described in the *Notice* demonstrates the need for a well-organized, “minuteman”

regulatory response.² If such relief can be successfully extended in one or two instances as the occasion arises, Sprint believes that the interest level among foreign carriers and governments considering a whipsawing strategy will abate, and the need for such relief will likewise diminish.

II. THE COMMISSION SHOULD ADOPT PROCEDURES THAT PROVIDE FOR IMMEDIATE INJUNCTIVE RELIEF UPON A CREDIBLE SHOWING OF WHIPSAWING CONDUCT BY A FOREIGN CORRESPONDING CARRIER.

As noted in the *Notice*, the Commission has already reserved authority over authorized U.S. carriers for temporary relief in the face of significant, immediate harm to the public interest.³ Sprint proposes that the Commission give meaning to this provision by creating procedures for immediate interim relief in whipsawing cases that correspond to the well-established requirements for injunctive relief set forth in *Virginia Jobbers v. Federal Power Commission*.⁴ In brief, these require an applicant for such relief to show that (1) the applicant will likely prevail on the merits in the full proceeding; (2) without the relief, the applicant will suffer irreparable injury; (3) no substantial harm will result to other parties if the relief is granted; and (4) the public interest will be served by the grant of the relief sought.⁵

These requirements will usually be met by a credible showing of whipsawing conduct by foreign carriers. If the facts are not in debate as to whether circuit blocking has been implemented or clearly threatened, the Commission's response to a request for immediate injunctive relief will be self-evident. In such cases, the facts will speak for themselves with regard to success on the merits. A non-negotiable demand for a rate increase backed up by a

² See *Notice* at ¶4 & nn.10-13.

³ *Id.* at ¶24 & n.10 (citing 47 C.F.R. §64.1002(d).)

⁴ 259 F.2d 921 (D.C. Cir. 1958).

⁵ *Id.* at 925.

threat of circuit blocking can be shown by affidavit or documentary evidence. Any circuit blocking will result in the blocked U.S. carrier suffering irreparable injury, including the immediate loss of revenue on blocked calls and the loss of market share (and revenues) as traffic shifts to the circuits of unblocked carriers. Properly framed relief will result in no harm to the foreign carrier(s) that initiated the whipsawing strategy, or to the U.S. carriers that may have cooperated in the coerced rate increase; accounting can ensure that traffic is rated appropriately after a decision on the merits. Finally, the public interest in forestalling successful whipsawing is clear: the U.S.-international services market will not suffer distortion and U.S. consumers will not be required to pay higher rates put into place by anti-competitive conduct.

A U.S. carrier seeking such immediate relief should be free to frame the injunctive remedy that it believes would be most effective, based on its knowledge of the specific facts of the case, but Sprint believes that the recent experience in circuit blocking shows that such relief must be immediate. In the Jamaica blocking episode, for example, whipsawing of AT&T, MCI and Sprint, which had their circuits blocked, became effective in matter of days, as IDT, which remained unblocked, was able to terminate substantial amounts of traffic in that short period. For any relief to be effective, the Commission must be prepared to grant it on an immediate, *ex parte* basis. A pleading cycle that requires several days for comments, replies and an explanatory decision will not be effective, for in that time circuits can be blocked, coerced agreements can be signed, and U.S.-international traffic will shift from the blocked to the unblocked U.S. carriers. Unless the Commission is prepared to reciprocate in kind to circuit blocking by ordering all U.S. carriers to cease sending traffic to the blocking foreign carrier, which Sprint does not advocate, untimely relief will not deter circuit blocking. For example, as the Philippines example demonstrates, a “stop-payment” order resulted in continued circuit blocking of some U.S. carriers over several months, while others continued to pass traffic during

that period. Only after several months of delayed payment did the Philippine carriers relent and unblock U.S. carriers' circuits.

Sprint supports the remedy of "stop-payment" orders that could be granted on an immediate, *ex parte* basis based on the above described requirements. For these orders to be effective, however, the Commission must open the possibility of a much more severe outcome in a decision on the merits. Specifically, the Commission should propose and establish through a rulemaking a remedy of "no-payment" for a specified period by all U.S. carriers for any international traffic terminated with a foreign carrier upon a finding that during that period any U.S. carrier has had its circuits blocked as a result of the foreign carrier's implementation of a whipsawing strategy.⁶ Sprint notes that such a remedy would not be applicable to all instances of circuit blocking, only those found to be used as a method of coercion within a pattern of anticompetitive conduct by the foreign carrier or the supervising foreign government. This remedy would be commensurate with the action taken by such foreign carriers or governments, in that it would deny the foreign carrier revenues unfairly gained from other U.S. carriers through whipsawing tactics and thus would substantially neutralize the penalty placed on the U.S. carrier that did not succumb to such tactics. Sprint submits, for example, that in the case of the Philippines, if the Philippines' carriers had before them the possibility that they would not be compensated for any U.S.-originated traffic sent to them during the period that they blocked the circuits of U.S. carriers, their circuit-blocking strategy would not have been sustainable.

⁶ To be effective, this remedy would apply to direct, bilateral arrangements between U.S. carriers and the blocking foreign carrier, and also to "re-filing," *i.e.*, U.S. carriers would be required to notify third-party non-U.S. international carriers that they would not be compensated for any traffic passed to them for termination in a country where a U.S. carrier's circuits were blocked.

Sprint recognizes the severity of this remedy, and the likelihood that it would meet with strong opposition from foreign carriers and governments that may consider circuit-blocking a legitimate strategy to enforce non-negotiable rate increase demands. Sprint submits, however, that such opposition will merely reflect the potential effectiveness of such a remedy. The vast majority of the foreign carriers with which Sprint does business will not be affected by this new rule, and it will deter other carriers from embarking on a whipsawing strategy based on what they may perceive as the relative success of whipsawing in the countries identified in the *Notice*.

III. NEITHER REIMPOSITION OF THE INTERNATIONAL SETTLEMENTS POLICY NOR THE LEVEL OF U.S. CARRIERS' COLLECTION RATES FOR INTERNATIONAL CALLING WARRANT THE COMMISSION'S ATTENTION IN THIS PROCEEDING.

The *Notice* asks for comment on reimposition of the International Settlements Policy ("ISP") or parts thereof as an element of interim relief for whipsawing.⁷ Sprint does not support use of the ISP in such cases. Typically, the goal sought by the whipsawing foreign carrier on a non-ISP route is an increase in its settlement rate; its methods for achieving this goal are circuit blocking or the threat of such blocking. ISP requirements such as reciprocal return traffic and symmetrical settlement rates do not form part of this dispute, and their reimposition becomes a distraction and complicates the ultimate resolution of the dispute. The Commission need not consider reimposition of the ISP in seeking remedies for the whipsawing problem.

Similarly, the notion voiced by some foreign government officials that the collection rates of U.S. carriers for international calling have not kept pace with decreases in settlement rates does not require the Commission's attention.⁸ While it is true that the rates for some

⁷ *Notice* at ¶11.

⁸ *See id.* at ¶12.

subscribers, particularly those who do not subscribe to an international calling plan, may be at levels considerably higher than the corresponding settlement rates, this observation overlooks the multi-faceted nature of the U.S.-international services marketplace. In particular, pre-paid card calling offers international callers extremely low rates, and capitalizes on the highly competitive wholesale market for international services described above. The marketplace is functioning, and Commission intervention in the level of U.S. carriers' international rates is neither necessary nor desirable.

IV. CONCLUSION

For the reasons given above, the Commission should initiate a rulemaking to establish procedures for immediate injunctive relief for U.S. carriers subjected to whipsawing tactics by foreign carriers or governments, including circuit disruption or the threat of circuit disruption, and to promulgate a rule establishing a mechanism under which the Commission can order U.S. carriers not to compensate foreign carriers during a period when such carriers block the circuits of any U.S. carrier as part of a whipsawing strategy.

Respectfully submitted,

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